

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE)
MEASURABLE COST SAVINGS)
DETERMINED BY DIRIGO)
HEALTH FOR THE SECOND) ORDER ON MOTIONS
ASSESSMENT YEAR)
)
Docket No. INS-06-900)

The Superintendent issues this order on Dirigo Health's motion for leave to present additional evidence, made June 19, 2006; Consumers for Affordable Health Care's ("CAHC") motion for leave to serve informational requests and/or present additional evidence, made June 19, 2006; Anthem Health Plans of Maine's ("Anthem") reservation with respect to informational requests and presentation of additional evidence, and request for enlargement of the deadline to file reply brief, made June 19, 2006; and on the Maine Association of Health Plans ("MEAHP") motion in support of Anthem's request for an enlargement, made June 21, 2006 (MEAHP also requested in its June 21st filing a reservation of rights related to any introduction of new evidence or the offer of additional testimony). By filings made June 21, 2006, Anthem, MEAHP, the Maine Automobile Dealers Association Insurance Trust ("Trust"), and the Maine State Chamber of Commerce ("Chamber") opposed Dirigo's and CAHC's motions; except, however, that the Chamber stated alternatively that it did not object to the presentation by Dirigo of objective data from Medicare cost reports, *i.e.*, updating Mercer's cost per case-mix adjusted discharge (CMAD) spreadsheet with the Medicare cost report data that are now available. Chamber Opposition filing at p. 5. By filing made June 23, 2006, CAHC made a consolidated reply to the opposition filings.¹

I. MOTIONS FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEFS

The current schedule provides for intervenors to file briefs on Friday June 23, Dirigo to file its brief on Friday June 30, and intervenor reply briefs due Wednesday July 5. Anthem and MEAHP seek an enlargement of the period to file their reply briefs to Friday July 7. Anthem and MEAHP each represent that Dirigo does not object to their requests for an enlargement of the deadline for the filing of their reply briefs. The Superintendent determines that it is reasonable and hereby ORDERS an enlargement of the current intervenor reply brief deadline from July 5 (the day following the July 4th national holiday) to Friday July 7, 2006, for all intervenor reply briefs (Anthem, MEAHP, the Trust, the Chamber, and CAHC). The 3 p.m. time deadline for making filings is unchanged and shall apply to the July 7 intervenor reply brief deadline.

¹ In its June 23rd filing, CAHC explicates the discovery sought and evidence to be introduced in this proceeding as Exhibit 1 (to the June 23rd filing) and testimony in support thereof. Exhibit 1 is a Freedom of Access request, dated June 20, 2006 made by CAHC on Dirigo; Dirigo's response to CAHC's request, dated June 21, 2006; and an undated report that was prepared sometime after June 6, 2006 by Mercer, Government Human Services Consulting, Dirigo staff's expert witness in the proceeding before the Dirigo Board, summarizing the Board's June 6th decision and presenting issues and concerns with that decision.

II. MOTIONS FOR LEAVE TO SERVE LIMITED INFORMATIONAL REQUESTS AND / OR PRESENT ADDITIONAL EVIDENCE

By the April 26, 2006 Notice of Pending Proceeding and Hearing, the Superintendent set forth the following as to discovery and evidence in this proceeding:

The Dirigo Board is required to conduct an adjudicatory proceeding pursuant to the Maine APA in order to make its determination of aggregate measurable cost savings for the second assessment year. 24-A M.R.S.A. § 6913(1)(A). The record of the Dirigo Proceeding and the filing made by the Dirigo Board with the Superintendent pursuant to 24-A M.R.S.A. § 6913(1)(B) shall constitute the record upon which the Superintendent will conduct his review for reasonableness. 24-A M.R.S.A. § 6913(1)(C). Any discovery conducted or evidence presented must be relevant to the issue of whether the determination of aggregate measurable cost savings made by the Dirigo Board pursuant to 24-A M.R.S.A. § 6913(1)(A) is reasonably supported on the record. *Id.*; see also 5 M.R.S.A. §§ 9056(2) and 9057(2), Bureau of Insurance Rule Chapter 350 §§ (3) and (13)(C).

A party may serve limited informational requests or present additional evidence if the Superintendent finds that the new information or additional evidence is relevant to the issue presented in this proceeding and will not cause repetition or unreasonable delay in the proceeding. Any party that intends to request leave to serve limited informational requests or to present additional evidence shall file a written motion with the Superintendent within ten (10) days after the Dirigo filing is made. After this deadline no motions to grant leave to serve informational requests will be entertained by the Superintendent. The moving party shall also file with the motion a detailed statement, in the nature of an offer of proof, of the discovery or evidence requested to be taken and the reason it is relevant to the Superintendent's determination. That statement shall be sufficient to permit the Superintendent to make a proper determination as to whether the service of informational requests or the taking of additional evidence as presented in the motion and offer of proof is appropriate and if so to what extent. If upon receipt of responses to informational requests a party desires to present additional evidence, it shall file a written motion containing the information described above.

Hearing Notice at pp. 4-5. This exact language was repeated (by quote) in the Superintendent's Orders On Intervention And Procedures, dated June 15, 2006. See June 15th Order at p. 8.

Under the Dirigo Health Act (24-A M.R.S.A. §§ 6901 – 6971), the Legislature directed as follows concerning the Superintendent's review of the Dirigo Board's determination of aggregate measurable cost savings:

- (1) The Superintendent is to hold a public hearing in accordance with the Maine Administrative Procedure Act (APA). 24-A M.R.S.A. § 6913(1)(C).

(2) “The superintendent shall approve the filing upon a determination that the aggregate measurable cost savings filed by the board are reasonably supported by the evidence in the record.” *Id.* (emphasis added.)

The APA defines “record” at section 9059, and the Superintendent specified that he meant the record before Dirigo. *See* 5 M.R.S.A. § 9059; *see also* Hearing Notice at pp. 4-5, June 15th Order at p. 8. The APA further provides that “unless otherwise limited by the agency to prevent repetition or unreasonable delay in proceedings, every party shall have the right to present evidence and arguments on all issues, and at hearing to call and examine witnesses and to make oral cross-examination of any person present and testifying.” 5 M.R.S.A. § 9056(2). This is modified by section 9057 which states that “[a]gencies may exclude irrelevant or unduly repetitious evidence.” 5 M.R.S.A. § 9057(2).

The Superintendent concludes that information not in the record developed before the Dirigo Board is irrelevant to the inquiry the Superintendent is charged with performing in this proceeding: whether the “aggregate measurable cost savings filed by the board are reasonably supported by the evidence in the record.” That is the single issue before the Superintendent, and the statute says that to make this determination the Superintendent shall look solely to the evidence in the record. The disputed data (Medicare Cost report data and certain other specified data) that Dirigo and CAHC desire to introduce into the record before the Superintendent is not in the Dirigo record – not because it was prohibited from being entered, but because it was not available by the statutorily / judicially imposed² deadline for the Dirigo Board to make its decision.³

By its June 6, 2006 decision, the Dirigo Board explained that its CMAD calculation “is preliminary” and that “there may be additional data available to include in the calculation when the Superintendent of Insurance undertakes his review of the Board’s determination.” June 6th Dirigo Decision at p. 13 and n. 5. The Superintendent is constrained under both the APA and the Dirigo law from acquiescing to the “placeholder” mentioned by the Board in its June 6th decision that would result in a later change to the aggregate measurable costs savings number from that determined by the Board on the record before it.

The Board approved an amount certain for aggregate measurable cost savings as it is required to do by law – being \$42.3M (subsequently revised to \$41.8M due to an addition error). *See* June 6th Decision. If the Superintendent were to allow new data (Medicare cost report data or otherwise) to be presented in the insurance regulatory proceeding, the end result would be an automatically different aggregate measurable cost savings number from that determined by the

² *See Maine Ass’n. of Health Plans v. Dirigo Health Agency*, KENSC-AP-06-26 (Me. Super. Ct., Ken. Cty., April 14, 2006) (Marden, J.), 2006 Me. Super. LEXIS 73.

³ The Superintendent notes that if the Medicare cost report data from June 2006 were to be admitted into the record of this year’s proceeding (the Dirigo year 2 proceeding), at next year’s proceeding before the Superintendent (the Dirigo year 3 proceeding) it is likely that there will be no new Medicare cost report data – the Superintendent’s year 3 determination would be due by mid-June 2007 (assuming an April 1, 2007 statutorily required Dirigo year 3 determination; a May 1 Dirigo filing with the Superintendent; and a June 15 Superintendent decision deadline, approximately.)


Dirigo Board on June 6th (*i.e.*, the resulting cost savings number could be \$200M more than approved on June 6th or, possibly, be a negative aggregate cost savings number, although very unlikely – either result which the Board, if it were to rule on the matter, may not find acceptable and may not have approved in making its determination of the cost savings). The Superintendent is of the opinion that he does not have the authority under the law to review an aggregate measurable cost savings number that the Dirigo Board has not approved on the record by the deadline established.

The Board's statutory responsibility was to make a determination of an amount certain of aggregate measurable cost savings – which it did by its June 6th Decision. The law does not appear to contemplate a scenario where the Board approves a formula which will be applied outside of the Board's jurisdiction (after the statutory deadline, April 1) to arrive at a determination of an amount certain of aggregate measurable cost savings which amount is never approved or reviewed by the Board. The Dirigo Board's responsibility to make a determination of aggregate measurable cost savings is separate from the statutory process which requires the Superintendent to approve a number, in whole or in part, that he finds to be reasonably supported by the evidence in the record. In other words, it is beyond the Superintendent's statutory authority to review in the insurance regulatory proceeding new data that was not in the Dirigo record and, therefore by necessity, not relied upon by the Dirigo Board to make its aggregate measurable cost savings determination.

For all of the foregoing reasons, the Superintendent DENIES both the June 19, 2006 motion of Dirigo Health for leave to present additional evidence, and the June 19, 2006 motion of Consumers for Affordable Health Care for leave to serve informational requests and/or present additional evidence (as explicated by CAHC's June 23, 2006 consolidated reply to the opposition filings and Exhibit 1 thereto). Accordingly, the motions of Anthem and MEAHP for reservation of rights regarding additional evidence are dismissed as moot.

PER ORDER OF THE SUPERINTENDENT

DATED: June 26, 2006


ALESSANDRO A. IUPPA
Superintendent of Insurance